United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original + affidavit of mailing

77-1385

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1385

10/25

UNITED STATES OF AMERICA,
Appellant,

—against—

CANDIDO NATAL RIQUELMY and FELIX LOPEZ,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney
(Of Counsel).

UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1385

UNITED STATES OF AMERICA,

Appellant,

—against—

CANDIDO NATAL RIQUELMY and FELIX LOPEZ,

Appellees.

BRIEF FOR THE APPELLANT

Issue Presented

Whether Candido Riquelmy and Felix Lopez have established their standing under the conspiracy and Travel Act counts of the indictment to contest the search of Eddie Riquelmy and the seizure from him of the narcotics.

Preliminary Statement

This is an appeal by the United States, pursuant to 18 U.S.C. § 3731, from an order of the United States District Court for the Eastern District of New York (Mark A. Costantino, *J.*) entered on August 3, 1977, granting the motion of the appellees to suppress as evidence a quantity of heroin recovered from their co-defendant, Eddie Riquelmy, at LaGuardia Airport on March 17, 1977. Both appellees are free on bail pending this appeal and any subsequent proceedings in the district court.

Statement of Facts

Eddie and Candido Riquelmy and Felix Lopez were all named in a three count indictment filed in the Eastern District of New York charging them with conspiring to possess heroin with intent to distribute (Count One), in violation of 21 U.S.C. § 846, possessing heroin with intent to distribute (Count Two), in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and travelling in interstate commerce to promote and facilitate the possession of heroin with intent to distribute (Count Three), in violation of 18 U.S.C. §§ 1952(a)(3) and 2 (A. 7-8).[1] The indictment arose out of a series of events which took place at LaGuardia Airport on March 17, 1977, when all three defendants were arrested following their arrival from Chicago and the seizure of a quantity of heroin from Eddie Riquelmy.

Prior to trial, the defendants moved to suppress the narcotics seized from Eddie Riquelmy, as well as their statements, their airline tickets, various items of identification and a quantity of lactose found in the vicinity of a nearby telephone following their arrest (A. 10-17, 144). A pre-trial suppression hearing, at which Special Agent Gerard Whitmore of the Drug Enforcement Administration ("DEA") was the sole witness for the Government, revealed the following.

At approximately 9:45 on the morning of March 17th, Agent Whitmore was on duty at LaGuardia Airport observing passengers arriving on American Airlines Flight 226 from Chicago (A. 21-24). Whitmore was at the airport that day to see if he could detect any narcotics couriers bringing drugs into New York from "source cities." (A. 23).[2]

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[1] All references are to pages of the Government's appendix.

[2] A "source city" is a city which, after study by the DEA Intelligence Division, has been designated as a point of origin for narcotics being transported to other cities in the United States. Chicago is a "source city." (A. 29-30).

As Whitmore watched the deplaning passengers, his attention was attracted by Eddie Riquelmy, Candido Riquelmy and Felix Lopez. After coming off the exit ramp from the aircraft in single file, all three stopped together in the arrival area and looked closely at the assembled people to see if anyone was watching them (A. 24-26). The three then proceeded to walk "in a triangular fashion," with one in the lead, one directly behind the leader, and one to the left in the rear, down the hallway towards the airport exit (A. 24-27). As they walked and encountered people in the airport, the three slowed down or sped up as the need arose, always, however, without speaking, maintaining their triangular formation and keeping the same distance between themselves (A. 26-27).

Agent Whitmore followed the three men past the baggage claim area, where they did not stop, and out of the terminal building to a taxi stand. At the stand, all three stopped and got in line and began to wait for a cab. At this point, Whitmore approached (A. 27-28).

After identifying himself as a federal narcotics agent, Whitmore turned to Candido Riquelmy, who appeared to act as a spokesman for the group, and asked him whether he and the other two men were together and, if so, where they were travelling from. Candido replied that the three were together and that they were coming from California. Then, in response to a request from Whitmore, he presented a ticket in the name "Natal." When Whitmore next asked for identification, Candido handed over a Pennsylvania driver's license bearing the name "Riquelmy" and also showed another document which had a different spelling from "Riquelmy." At this point, Whitmore asked Candido if he was Puerto Rican or Mexican. Candido immediately replied, "No, no. I'm Puerto Rican." (A. 31-32).

Turning next to Felix Lopez, Agent Whitmore also asked him for his ticket. In response, Lopez proffered an American Airlines ticket in the name "T. Puente," adding, "The ticket is not in my name because it was made by them." (A. 32-33). Lopez then handed over a New York State driver's license bearing his true name (A. 33).

With the group still standing in the taxi line, Whitmore now directed his attention to Eddie Riquelmy. And although Whitmore could see a ticket protruding from his rear pocket (A. 35), Eddie told the agent that he did not have his ticket with him. Instead, he produced a green identification card. As Eddie was displaying this card, there fell to the ground a white piece of paper which appeared to be a map. Eddie immediately tried to cover the map with his foot, but Whitmore was able to retrieve the paper before he stepped on it (A. 34).

Whitmore's suspicions were now thoroughly aroused. Not only had the three men walked in silence from the arrival area to the taxi stand in their odd triangular formation, but they had presented what appeared to be false identification, and Eddie Riquelmy had become alarmed when he dropped the map. In addition, all three were now openly nervous, and their hands were shaking (A. 36). Accordingly, Whitmore asked the two Riquelmys and Lopez to leave the taxi line and to accompany him into the terminal building so that he could question them further about their identification (A. 36). The three agreed and promptly followed the agent back inside to an open space adjacent to the baggage claim area, with Whitmore still holding the tickets and driver's licenses from Candido Riquelmy and Felix Lopez and the map and green identification card from Eddie Riquelmy (A. 36-37, 50).

Inside, after calling for assistance, Whitmore had a further conversation with Candido Riquelmy. Candido

told Whitmore that he (Whitmore) had misunderstood him. Candido said that he had not meant earlier that he and his friends were coming from California. He now explained that the group was travelling from Chicago and reiterated that he and his two companions were Puerto Rican. Whitmore replied by asking Candido and Lopez to step over to a bank of telephones several feet away against the wall so that he could talk to Eddie Riquelmy. Candido complied, but, before doing so, he conversed in Spanish—which Whitmore did not understand—with Eddie Riquelmy and Lopez (A. 38-40).

With Candido and Lopez standing aside and with New York Port Authority Police Officer William Towns as a witness, Whitmore again directed his attention to Eddie Riquelmy and proceeded to ask for further identification (A. 40-42). Eddie responded by making a "sudden move" for one of the pockets of a leather coat which he had draped over his arm. Before he could reach inside the pocket, however, Whitmore stopped him and asked that he hand over the coat so that Whitmore could retrieve the identification. Eddie did so, and Whitmore felt inside the jacket a large, hard bulge. Not sure what the bulge was, Whitmore put his hand inside the pocket and pulled out a package wrapped in tape. Taking his pen, the agent punched a hole and was able to see inside the package what was later determined to be brown rock heroin (A. 42-44). At this point, both Riquelmys and Lopez were placed under arrest (A. 44).

Immediately following the arrest, Candido Riquelmy began yelling in Spanish to his brother and Lopez. Acting quickly, and with the aid of another agent, Whitmore at once separated Candido from the other defendants by removing him to another section of the lobby (A. 44-45). The agents then searched each of the three suspects and the surrounding area. Over the telephone in front of which Lopez had been standing there was found a bag of lactose, a dilutant for narcotics (A. 44-46).

None of the defendants testified at the suppression hearing. The sole witness called by the defense was Officer Towns. Towns simply testified to his observations of Whitmore and the three defendants inside the terminal during the recovery of the narcotics from Eddie Riquelmy (A. 124-136).

On August 3, 1977, in a three page memorandum and order, Judge Costantino suppressed, as against all three defendants on all counts, the heroin seized from Eddie Riquelmy.[3] Relying on *United States* v. *Chadwick*, — U.S. —, 45 U.S.L.W. 4797 (June 21, 1977), the court determined that once Whitmore ascertained that the package from Eddie Riquelmy's jacket did not contain a weapon, he should either have obtained Eddie's consent or a warrant before puncturing the package (A. 216-218). Thereafter, on September 1, 1977, the United States filed its notice of appeal.[4]

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[3] The court made no ruling with respect to the lactose found near the telephone, the statements of the defendants and the other physical evidence.

[4] The notice of appeal names both Riquelmys and Felix Lopez. Since, however, we are only appealing on the question of the standing of Candido Riquelmy and Felix Lopez under two or the three counts in the indictment, we are withdrawing our appeal as against Eddie Riquelmy.

ARGUMENT

Candido Riquelmy And Felix Lopez Have Not Established Their Standing Under The Conspiracy And Travel Act Counts Of The Indictment To Contest The Search Of Eddie Riquelmy And The Seizure From Him Of The Narcotics.

Eddie and Candido Riquelmy and Felix Lopez stand charged with conspiring to possess heroin with intent to distribute (Count One), possession of heroin with intent to distribute (Count Two) and travelling in interstate commerce from Chicago to New York to promote and facilitate the possession of heroin with intent to distribute (Count Three). As noted above, the district court suppressed, as against all defendants on all counts, the heroin seized from Eddie Riquelmy. On appeal, the United States does not challenge the court's decision on the merits or its finding of standing with respect to Eddie Riquelmy. Nor do we challenge the standing of Candido Riquelmy and Felix Lopez under the possession count. Rather, our sole contention is that Candido Riquelmy and Felix Lopez have failed to establish their standing under the conspiracy and Travel Act counts to contest the search of Eddie Riquelmy and the seizure from him of the narcotics.[5]

There are two ways in which a defendant can claim standing to contest a search and seizure. First, there is the automatic standing rule enunciated in *Jones* v. *United States*, 362 U.S. 257, 263-264 (1960), which "has been

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[5] The indictment is being dismissed in its entirety as against Eddie Riquelmy. If we are successful on appeal and if there is a trial in this case, we will move to sever and dismiss the possession count as against Candido Riquelmy and Felix Lopez and will try them only on the conspiracy and Travel Act charges.

questioned" in *Brown* v. *United States*, 411 U.S. 223 (1973), and is of "dubious validity." *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205, n.4 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). The rule affords standing, even though the defendant's Fourth Amendment rights were not violated, where, as in Count Two here, the defendant is charged with a possessory offense, and the possession alleged in the indictment occurred at the same time as the search and seizure. See *Brown* v. *United States*, *supra*, 411 U.S. at 229.

A defendant can also assert actual standing. To do so, however, he must establish "that he himself was the victim of an invasion of privacy." *Jones* v. *United States*, *supra*, 362 U.S. at 261. In this case, under the conspiracy and Travel Act charges, at least, we submit that the automatic standing rule is not available to Candido Riquelmy and Felix Lopez. We further submit that, on the basis of the record before the Court, neither Candido nor Lopez has shown how his privacy was invaded by the search of Eddie Riquelmy so as to confer actual standing for purposes of the conspiracy and Travel Act counts.

Candido and Lopez cannot rely on the automatic standing rule under Counts One (conspiracy) and Three (Travel Act), because the rule only applies where "possession at the time of the contested search and seizure is an essential element of the crime charged." *Brown* v. *United States*, *supra*, 411 U.S. at 227. And, in this connection, it has been held that the government is under no obligation to prove possession in a prosecution for conspiracy to possess. *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). Or, put another way, possession is not a necessary element of the crime of conspiracy. *United States* v. *Mejias*, 552 F.2d 435, 445 (2d Cir. 1977); *United States* v. *Banerman*, 552 F.2d 61, 63 (2d Cir. 1977); *United States* v. *Galante*, 547 F.2d 733, 738 (2d Cir.

1976). Similarly, possession is not an essential element of the offense described in 18 U.S.C. § 1952 (the Travel Act), which makes it a crime, *inter alia*, to travel in interstate commerce, as appellees did, to promote or facilitate the narcotics business. *United States* v. *Prince*, 529 F.2d 1108, 1111-1112 (6th Cir. 1976); *United States* v. *Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969), *cert. denied sub nom. Tornabene* v. *United States*, 397 U.S. 967 (1970); *Spinelli* v. *United States*, 382 F.2d 871, 893 (8th Cir. 1967), *reversed on other grounds*, 393 U.S. 410 (1969). Thus, appellees have no automatic standing under Counts One and Three of the indictment.[6]

Nor, we submit, can appellees claim actual standing to challenge the search of Eddie Riquelmy, for they have not met their burden of establishing that any privacy right of their's was injured by the search and seizure from the jacket and the puncturing of the heroin package. *United States* v. *Masterson*, 383 F.2d 610, 613-614 (2d Cir. 1967), *cert. denied*, 390 U.S. 954, *rehearing denied*, 391 U.S. 909 (1968).

The ability of a defendant to claim the protection of the Fourth Amendment depends upon whether that defendant—*and that defendant alone, Alderman* v. *United*

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[6] In *Galante*, this Court stated that, until the automatic standing rule was overruled by the Supreme Court, it would continue to follow the rule in the case of possessory offenses. *United States* v. *Galante*, *supra*, 547 F.2d at 737. Consequently, as already indicated, we are not pressing here a challenge to the ruling of the district court as far as the possession charge in the indictment is concerned. See *United States* v. *Oates*, — F.2d —, Docket No. 76-1100, Slip Op. 6389, 6399-6406 (2d Cir. June 3, 1977). Nevertheless, we continue to believe that the automatic standing rule is no longer valid after *Simmons* v. *United States*, 390 U.S. 377, 390 (1968); see *United States* v. *Pui Kan Lam*, *supra*, 483 F.2d at 1205, n.4, and that it should be rejected, as the Sixth Circuit has already done. *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976).

States, 394 U.S. 165, 171 (1969)—can show that the invaded place was an area where he was entitled to "a reasonable expectation of freedom from governmental intrusion." *Mancusi* v. *DeForte*, 392 U.S. 365, 368 (1968). Here, with respect to Eddie Riquelmy and his jacket and the narcotics package, we believe that Candido Riquelmy and Felix Lopez have not made such a showing.

Our position in this appeal is supported by the cases. In *United States* v. *Hunter*, 550 F.2d 1066 (6th Cir. 1977), Sheryl Hunter and Ezell Allen were arrested at the Detroit Metropolitan Airport early on the morning of August 5, 1975, shortly after their arrival on a flight from Los Angeles. Found on Hunter at the time of her arrest were 280 grams of heroin sewn in her girdle. No narcotics were found on Allen.

Subsequent to their arrest, both Hunter and Allen were indicted and charged with possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Prior to trial, the defendants moved to suppress the narcotics as evidence, and the district court granted the motion, finding that both Hunter and Allen had standing and holding that there was insufficient probable cause for the arrest which led to the discovery of the drugs in Hunter's girdle.

On an appeal by the United States, the Court of Appeals for the Sixth Circuit affirmed the suppression of the heroin as against Hunter, agreeing with the district court that there was insufficient probable cause for the arrest. However, the court reversed the decision of the trial judge granting suppression as to defendant Allen, on the ground that Allen lacked standing to complain of the search of Hunter. After pointing out that the Sixth Circuit no longer recognizes the doctrine of automatic standing, *United States* v. *Hunter*, *supra*, 550 F.2d at 1072-1074; see footnote 6, *supra*, the court held that

Allen did not have actual standing to challenge the search of Hunter. In this regard, the court stated (550 F.2d at 1074):

> In the present case, defendant Allen did not have the heroin seized from him. The heroin was found sewn in defendant Hunter's girdle. Defendant Allen cannot assert defendant Hunter's Fourth Amendment rights but must assert his own. *Alderman* v. *United States*, *supra*, 394 U.S. 165, 89 S. Ct. 961. It would be an absurdity to suggest that defendant Allen had a reasonable expectation of privacy in defendant Hunter's girdle. . . .

Similarly, in *United States* v. *Boston*, 510 F.2d 35 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975), defendant Boston and his female companion were arrested at the Mexican border after a search of the woman's vagina revealed a quantity of heroin. As a result, Boston was charged in a four-count indictment with importation of heroin under 21 U.S.C. §§ 952 and 960, possession of heroin with intent to distribute under 21 U.S.C. § 841 (a)(1) and two separate counts of conspiracy to import and possess heroin, in violation of 21 U.S.C. § 963. At trial, the narcotics was admitted in evidence, and Boston was acquitted under the conspiracy counts but convicted on the importation and possession charges.

On appeal, Boston's conviction on the possession count, where he had automatic standing under *Jones*, was reversed after the Ninth Circuit Court of Appeals held that the search of his companion's vagina was illegal and that the heroin should have been suppressed. The court also determined, however, that under the importation count, where he did not have the benefit of the *Jones* rule, Boston did not have standing because he had failed to demonstrate an interest in the heroin when he moved to suppress the narcotics. The court thus affirmed the conviction on the importation charge.

Turning to this case, we submit, based on the facts and the relevant law, that Candido Riquelmy and Felix Lopez have not established their standing under the conspiracy and Travel Act counts. The record simply shows that the two Riquelmys and Lopez arrived together on the flight from Chicago, that they proceeded out of the airport to the taxi stand, that they were each questioned at the stand by Agent Whitmore and that they accompanied Whitmore back inside the terminal where Eddie Riquelmy was questioned and the heroin was taken from his jacket. The drugs were taken from Eddie Riquelmy, not Candido or Felix Lopez, and neither Candido nor Lopez has demonstrated any interest in either Eddie Riquelmy's jacket or the package containing the drugs which was found in the jacket. Since appellees do not have automatic standing and since they have not established their actual standing, they cannot, under the conspiracy and Travel Act counts, complain of the search and seizure involving Eddie Riquelmy. The district court thus erred in suppressing the heroin as against them.[7]

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[7] In finding that Candido Riquelmy and Felix Lopez had actual standing, the court relied on its earlier decision in *United States* v. *Westerbann-Martinez*, — F. Supp. —, Docket No. 77 Cr. 208 (E.D.N.Y. July 19, 1977) (A. 216, 219). There, Carlos Westerbann-Martinez and Luis Angel Torres were stopped by DEA agents at LaGuardia Airport after they arrived on a flight from Chicago. While questioning the two men, the agents found a quantity of heroin in a shoulder bag being carried by Westerbann-Martinez. Both Westerbann-Martinez and Torres were promptly arrested (A. 220-224).

Prior to trial, both defendants, who were charged in three counts with possession of heroin with intent to distribute, conspiracy and a Travel Act violation, moved to suppress the narcotics seized from Westerbann-Martinez. In granting the motion to suppress as to both defendants on all counts, the court found that Torres, who had failed to assert an interest in either the bag or its contents, had actual standing under the conspiracy and Travel Act counts to contest the search of Westerbann-Martinez' shoulder bag. The court based this finding on the proposi-

[Footnote continued on following page]

CONCLUSION

The order of the district court should be vacated with respect to Candido Riquelmy and Felix Lopez, and the case should be remanded for further proceedings.

Dated: Brooklyn, New York
October 21, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
(Of Counsel).

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tion that since Westerbann-Martinez and Torres were arrested together, they had to be viewed not individually, but, rather, collectively as a unit (A. 230). Hence, the court concluded, Torres, as a member of the unit, was a victim of the invasion of privacy resulting from the search of Westerbann-Martinez' bag. *Id.* Accordingly, he was found to have actual standing.

We respectfully submit that the court erred in its holding in *Westerbann-Martinez* that Torres had actual standing vis-a-vis his co-defendant's bag. As *Jones, Alderman, Hunter, Boston* and countless other cases make very clear, Fourth Amendment rights are personal. The mere fact that two individuals are stopped and questioned together does not merge them into a single unit for purposes of determining standing. *Westerbann-Martinez* can thus provide no support for the contention that Candido Riquelmy and Felix Lopez have actual standing in this case. See, generally, Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421 (1975).

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 25th day of October 1977 he served a copy of the within

Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

David S. Jacobs, Esq.	Stephen R. Laufer, Esq.	Julian S. Linker
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Brooklyn, New York 11201	Brooklyn, N.Y. 11201	New York, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this
25th day of Oct. 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3460350
Qualified in Kings County
Commission Expires March 30, 1979